

Recent changes in Brazil on the remittance of royalties abroad

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On December 29, 2021, the Law No. 14,286 was sanctioned, bringing up a significant foreign exchange reform in Brazil. It impacted in a few and relevant aspects for the Brazilian exchange market, foreign capital, and the provision of information to the Brazilian Central Bank (Bacen). The new regulation will come into force next December 30, 2022, and players with operations in Brazil should be aware of relevant changes.



The new regulation will modify the current requirements for remitting payments abroad and registering the agreements commonly named as transfer of technology agreements, which include: (a) licensing/assignment of industrial property rights; (b) acquisition/transfer of non-patented technology; (c) provision of specialized technical/scientific services; and (d) franchising.

Currently, the mentioned transfer of technology agreements are subject to registration with the Brazilian Patents and Trademarks Office ("INPI") as a precedent condition for (i) the remittance of royalties abroad as payment for transfer of technology/knowledge allowed by Bacen; (ii) allowing tax deductibility, by the Brazilian party, of the royalties paid abroad as operational expenses; and (iii) guaranteeing the enforceability of the agreement against third parties and enabling the grantee, if provided in the agreement, to represent the grantor before the Brazilian courts in relation to the granted IP rights.

The rationale above is due the interpretation of the following rules, in addition to Law No. 9,279 of May 14, 1996 ("Brazilian IP Law"): (i) Law No. 3,470/58 (related to limitations on tax deductibility for the exploitation of determined IP assets); (ii) Ministry of Finance Ordinance 436/58 (related to the maximum percentages for tax deductibility on royalties paid for the exploitation of certain IP assets); (iii) Law No. 4,131/62 (related to the investment of foreign capital in Brazil and remittances abroad); and (iv) Law No. 8,383/91 (related to the deductibility and calculation of income tax).

The article 14 of Law No. 4,131/62 combined with the sole paragraph of article 50 of Law No. 8,383/91 strictly prohibited the remittances of royalty payments related to the licensing of patents and trademarks between controller and subsidiary established in Brazil in what exceeds the correspondent cap of deductibility (which is provided by Ordinance No. 436/58). Such restriction will no longer be in force as of the end of this year. Furthermore, the language of article 50 of Law No. 8,383/91 was also amended. As of December 30, 2022, the necessity of registration of the transfer of technology agreements before the Bacen will be excluded.

In other words, the international remittance of payments related to transfer of technology agreements will be possible regardless of any registration with Bacen or with INPI, keeping the requirement of registration before the INPI for tax deductibility purposes only. Additionally, it will be possible to remit payment exceeding the correspondent cap of deductibility in those cases where it is currently prohibited.

This issue is highly important to several companies, as they have used the tax deduction limit to assist in complying with foreign transfer pricing rules. Moreover, despite important improvements in recent years, it is known that the requirement of submission of contracts for registration makes many processes slower and more costly for companies.

The fact is that such restrictions can be used to harm the contracting between Brazilian and foreign companies. The foreign exchange reform aimed to modernize the system in Brazil and will affect the interface with the INPI in some operations. As of said amendments in such an important scenario for international markets, it is expected that the new Law No. 14,286/21 work to smooth negotiations and encourage new international partnerships for the exchange of knowledge and technologies.

Once the Law comes into force, it will reduce the state interventionism, and will work to strengthen the autonomy of the contracting parties. In this way, companies with operations in Brazil should be aware of such changes and perhaps review their own international contracts' strategy.

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